

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

BOSTON GAS COMPANY
d/b/a KEYSpan ENERGY
DELIVERY NEW ENGLAND

D.T.E. 03-40

**MOTION OF THE ATTORNEY GENERAL TO STRIKE
PORTIONS OF THE INITIAL BRIEF OF BOSTON GAS COMPANY**

The Attorney General, pursuant to 220 C.M.R. §§ 1.04(5) and 1.11(7) and (8), hereby moves that the Department of Telecommunications and Energy (“Department”) strike portions of the initial brief (“Initial Brief”) of Boston Gas Company, D/B/A KeySpan Energy Delivery New England (“Company”) in this proceeding. As grounds for his Motion, the Attorney General states the following:

The Department does not allow parties to testify in a brief to factual matters not supported on the record. *Western Massachusetts Electric Company*, D.P.U. 86-8C-1, p. 23, n.5 (1986); *AT&T Communications*, D.P.U. 85-137, p. 49 (1985); *AT&T Communications*, D.P.U. 91-79, pp. 5-11 (1991); *Verizon Alternative Regulatory Plan*, D.T.E. 01-31-Phase II, Hearing Officer Ruling Granting Motion Of Attorney General To Strike Portions Of AT&T's Brief, December 19, 2002.

The Department’s rules provide that “[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause.” 220 C.M.R. § 1.11(8). The Department made it clear long ago that, except for updates of routine information already provided on the record, *e.g.*, property tax bills,

a motion to reopen must be filed and granted **before** the testimony or exhibits are “thrust upon the trier of fact,” noting that “one cannot un-ring a bell.” *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989).

Before making these assertions in its initial brief based on alleged facts not in the record, the Company did not make a motion to reopen the record and admit additional facts in evidence, based on a showing of good cause. Citing facts in a brief that are not in the record, known to all or readily ascertainable, unfairly prejudices the rights of other parties. The Department has stated that its “case law on late-filed exhibits is based upon the premise that late-filed exhibits are prejudicial because other parties do not have the opportunity to conduct cross-examination regarding information contained in late-filed exhibits in order to test the accuracy of the data through the litigation process.” *Fitchburg Gas and Electric Light Company*, D.T.E. 98-51, p. 9 (1998); *New England Telephone and Telegraph Company*, d/b/a/ NYNEX, D.P.U. 94-50 at 62 (1995). Hence, only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into evidence following the close of evidentiary hearings. *See Payphone See Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination).

State administrative law requires that parties be given an opportunity to cross examine witnesses and present rebuttal evidence. G.L. c. 30A, § 11(3). Allowing the Company to cite, reference or otherwise rely upon extra-record evidence that the Attorney General had no opportunity to cross-examine or rebut violates the Attorney General’s procedural rights and the Department rules and precedent. *See MediaOne/New England Telephone*, D.T.E. 99-42/43, p. 17-18 (1999); *Boston Edison Company*, D.P.U. 90-335, p. 7-8 (1992); *Payphone Inc.*, D.P.U. 90-

171, p. 4-5 (1991); *see also* G.L. c. 30A, § 11; and 220 C.M.R. §§ 1.11(4), 1.11(7); and 1.11(8).

Department precedent establishes that the proper procedure is to “strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence.” *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach of “[striking] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case.” *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), *citing* *Service Publications Inc. v. Goverman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

Unless the Company produces supporting citation to the record, the Department should strike the following portions of the Company’s initial brief where the Company made factual claims without citation to the record:

- The second sentence of the paragraph that begins on page 24 regarding plant additions:

In each case, the IRR calculated based on estimated costs exceeded the Company’s weighted cost of capital of 9.38 percent, and in each case costs were incurred during the construction phase that could not have been foreseen by management at the outset of the project.

Also, the penultimate sentence of that section:

To the contrary, the record shows [no citation] that, at the time the investments were undertaken, the projects would provide a return to the Company in excess of the cost of capital, and therefore, the Company’s decision to commence the projects was reasonable in light of the circumstances that then existed.

- The second part of the second sentence of the first paragraph on page 26 regarding the West Roxbury project cost overrun:

... which means that the work order involves a much larger job than originally estimated and would have likely involved two adjacent projects

that were more efficiently accomplished at the same time.

- Portions of footnote 38 on page 86, where the Company included data in its brief regarding the IRR and net present value calculations that do not appear in the record and cannot be reasonably derived from the record alone:

Following that investment, annual costs consist of an annual depreciation cost of \$2,407,796 (representing 5 percent annual depreciation on the total investment of \$48,155,916 over twenty years) and annual property taxes of \$1,300,210 (developed by multiplying the aggregate investment of \$48,155,916 by the composite property tax rate for Boston Gas of 2.7 percent for each of the 25 years). This comparison results in a net profit of \$11,747,063 during the first fifteen years, \$2,833,415 for years 16 through 20, and \$5,241,211 for years 21 through 25.

and:

The annual net income for years 1 through 15 is \$9,547,074, for years 16 through 20 is \$4,129,084 and for years 21 through 25 is \$3,185,346. The Excel IRR function is then applied to those annual net income amounts to derive the IRR of 18.83 percent and the NPV function with a discount rate of 9.5 percent is applied to the same net income numbers to arrive at an NPV of \$32,636,294.

- Page 100, last paragraph, sentences 2-4, where the Company makes unsupported claims about what the invoices cover and how much of the invoices relate to the Value Snob advertisement:

However, the invoices cited include significant charges for airtime, and since the ad did not run, those charges do not apply to the Value Snobs ad. Instead, those charges apply to the Bathtub Ad, which is also covered by the same invoices. The record shows that the development costs of the Value Snob as totaled only a small fraction of the total costs.

The invoices (attached) do not contain data sufficient to support the Company's claim.

- Page 211, the sentence that precedes footnote 88 on page 211:

As a result, any reduction in bargaining unit staffing levels from that level in place as of November 1, 1997, were (*sic*) accomplished in accordance with the collective bargaining agreements executed by the Company and the relevant bargaining units.

; the last sentence in footnote 88:

The employees remain in the Company's employ and the Company has not reduced those jobs.

; the sentence that carries over onto page 212:

As provided for on the record [no citation] the Company has consistently met or exceeded its historical benchmarks (which, for some service quality standards, are based on ten years of data) without receiving a penalty.

and, the last part of the next sentence on page 212:

... and the record demonstrates that there was no such adverse affect (*sic*) on the Company's service quality.

For these reasons, the Department should grant this Motion To Strike the above-listed portions of the Company's Initial Brief.

Respectfully submitted,
THOMAS REILLY
ATTORNEY GENERAL

By: _____
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Dated: September 18, 2003

COMMONWEALTH OF MASSACHUSETTS
before the
DEPARTMENT OF PUBLIC UTILITIES

BOSTON GAS COMPANY)
d/b/a KEYSPAN ENERGY)
DELIVERY NEW ENGLAND)
_____)

D.P.U. 03-40

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Boston this 18th day of September, 2003.

Edward G. Bohlen
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September 18, 2003

Mary L Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2d Fl.
Boston, MA

Re: KeySpan, D.T.E. 03-40

Dear Secretary Cottrell:

Enclosed for filing please find the **Motion of the Attorney General To Strike Portions Of The Initial Brief Of Boston Gas Company** in the above-referenced proceeding, with a Certificate of Service.
Thank you.

Sincerely,

Edward G. Bohlen
Assistant Attorney General

Enclosures